IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

MICHAEL BROOM; KEVIN BROOM; and ANDREA BROOM, RESPONDENTS, vs. MORGAN STANLEY DW INCORPORATED and KIMBERLY ANNE BLINDHEIM, PETITIONERS.	No. 82311-1 RESPONDENT BROOMS' STATEMENT OF ADDITIONAL AUTHORITY [RAP 10.8]

Pursuant to RAP 10.8, Respondents the Brooms wish to call the Court's attention to the following additional authorities:

ORIGINAL

1. ***City of Federal Way v. Koenig*, 217 P.3d 1172 (WA S.Ct. Oct. 17, 2009)** – "The principle of stare decisis ' "requires a clear showing that an established rule is incorrect and harmful before it is abandoned."' *Riehl v. Foodmaker, Inc.*, 152 Wash.2d 138, 147, 94 P.3d 930 (2004) (quoting *In re Rights to Waters of Stranger Creek*, 77 Wash.2d 649, 653, 466 P.2d 508 (1970)). This respect for precedent 'promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.' *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed2d 720 (1991). [¶10] . . . First, . . . [m]aking the same arguments that the original court thoroughly considered and decided does not constitute a showing of 'incorrect and harmful.' *Brutsche v. City of Kent*, 164 Wn.2d 664, 682, 193 P.3d 110 (2008). Second, the *Nast* court considered the full definition of agency and found that the judiciary was not included. *Nast*, 107 Wash.2d at 305, 730 P.2d 54. . . . The *Nast* court reasonably concluded that the legislature did not intend to include the judiciary, basing its ruling on a 'reading of the entire public records section of the [PRA].' *Id.* at 306, 730 P.2d 54. Koenig has failed to demonstrate that this holding was incorrect and harmful. Without such a showing, we will not overturn precedent. . . . [¶12] More notably, the legislature has declined to modify the PRA's definitions of agency and

public records in the 23 years since the *Nast* decision. This court presumes that the legislature is aware of judicial interpretations of its enactments and takes its failure to amend a statute following a judicial decision interpreting that statute to indicate legislative acquiescence in that decision. *Soproni v. Polygon Apartment Partners,* 137 Wash.2d 319, 327 n.3, 971 P.2d 500 (1999)." ***Federal Way v. Koenig, supra,* 217 P.3d at 1174-75.**

Issue to which this authority pertains: Both of MSDW's issues (standard of review for vacating arbitration award, and non-applicability of statute of limitations in arbitration) seek to overrule long-established Washington precedents that have not been shown to be incorrect or harmful; that fully considered the arguments pro and con; and that the legislature has accepted rather than exercising its power to abrogate by amendment of the underlying statutes.

2. *SS Construction, Inc. v. ADC Properties, LLC,* 151 Wn. App. 247, 211 P.3d 415 (Div. 2, April 28, 2009) – "Generally, we do not review alleged substantive errors in an arbitration award. *Davidson,* 135 Wash.2d at 119, 954 P.2d 1327 (reviewing court cannot generally address the underlying merits of an arbitration award). 'In the absence of an error of law on the face of the award, the arbitrator's award will not be vacated or modified.' *Davidson,* 135 Wash.2d at 118, 954 P.2d 1327 (citing *Boyd*

v. Davis, 127 Wash.2d 256, 263, 897 P.2d 1239 (1995))." ***SS Construction, supra,* 151 Wn. App. at 261.**

Issue to which this authority pertains: Division 2 again relied upon long-established Washington law setting forth the **error of law on the face of the award** standard of review, recognized that it is a very narrow and deferential standard, and refused to vacate an arbitration award.

3. *McGinnity v. Autonation, Inc.,* 149 Wn. App. 277, 202 P.3d 1009 (Div. 3, March 12, 2009) – "The parties agree that our review of an arbitrator's award is strictly proscribed. Appellate scrutiny does not include review of an arbitrator's decision on the merits, which would defeat the purpose of arbitration. *Beroth v. Apollo Coll., Inc.,* 135 Wash. App. 551, 559, 145 P.3d 389 (2006). Therefore, '[i]n the absence of an error of law on the face of the award, the arbitrator's award will not be vacated or modified.' *Davidson,* 135 Wash.2d at 118, 954 P.2d 1327. [¶9] One of the statutory grounds for vacating an award exists when an arbitrator exceeds his powers, as demonstrated by an error of law on the face of the award. RCW 7.04A.230(d); *Lindon Commodities, Inc. v. Bambino Bean Co.,* 57 Wash. App. 813, 816, 790 P.2d 228 (1990). 'The error should be recognizable from the language of the award, as, for instance, where the arbitrator identifies a portion of the award as punitive damages in a jurisdiction that does not allow punitive damages.'

Federated Servs. Ins. Co. v. Pers. Representative of the Estate of Norberg, 101 Wash. App. 119, 124, 4 P.3d 844 (2000)." ***McGinnity v. Autonation, supra,* 149 Wn. App. at 282.**

Issue to which this authority pertains: The issue of continued viability of the **error of law on the face of the award** standard of review, because Division 3 applied it, recognized that it is a deferential standard, and refused to vacate an arbitration award. The issue of statutory basis for error of law on the face of the award: it is derived from statutory authority under both the WAA and the RUAA to vacate an award when "the arbitrators exceeded their powers." RCW 7.04A.230(d) (formerly RCW 7.04.160(4)). Furthermore, this case applies to the meaning of error on the face of the award, since the example the Court gave of awarding punitive damages when the law does not allow them is indistinguishable from the arbitrators' error here, awarding a dismissal based on statute of limitations when the law does not allow it.

4. Ninth Circuit Cir. Rule 36-3: "(a) **Not Precedent.** Unpublished dispositions and orders of this Court are not precedent, except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion."

Issue to which this authority pertains: The unpublished Ninth Circuit decision of *Knight v. Merrill Lynch, Pierce, Fenner & Smith,* relied upon

as an additional authority by Petitioners MSDW, and cited by AMICUS Securities Industry, lacks precedential value.

RESPECTFULLY SUBMITTED this 15th day of January, 2010.

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